**U.S. Department of Labor**

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**Issue Date: 30 October 2006**

Case No.: 2004BLA06468

IN THE MATTER OF:

W.I.,
Claimant,

v.

COASTAL COAL COMPANY, LLC,
Employer,

and

UNDERWRITERS' SAFETY & CLAIMS, INC.,
Carrier,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest.

## DECISION AND ORDER DENYING LIVING MINER'S BENEFITS

This case arises from a claim for benefits filed under the "Black Lung Benefits Act," Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, at 30 U.S.C. § 901 *et seq.* ("Act"), and the implementing regulations at 20 C.F.R. Parts 718 and 725 (2006).[1] In this case, Claimant waived the hearing. Therefore, the case is being decided on the record and the decision in this matter is based upon the documentary evidence admitted into the record, which was held open until June 30, 2006, for the submission of briefs, and the arguments of the parties presented in their briefs. The documentary evidence admitted includes *Director's*

[1] The Secretary of Labor adopted amendments to the regulations implementing the Federal Coal Mine Health and Safety Act of 1969 as set forth in the Federal Register, 65 Fed. Reg. 79,920 (Dec. 20, 2000). These revised regulations became effective on January 19, 2001. Id. Accordingly, because Claimant filed his claim on May 9, 2003, (DX2) the amended regulations are applicable in this case. Moreover, as Claimant last engaged in coal mine employment in the state of Kentucky, appellate jurisdiction of this matter lies with the Sixth Circuit Court of Appeals. Shupe v. Director, OWCP, 12 B.L.R. 1-200, 1-202 (1989)(en banc).

*Exhibits* ("*DX"*) 1 through 35,[2] *Claimant's Exhibit* ("*CX"*) 1, and *Administrative Law Judge's Exhibits* ("*ALJX"*) 1 through 10, with the following exceptions: attachments 1 and 2 of *ALJX* 7 (Employer's Brief) are being excluded from the record pursuant to 20 C.F.R. § 725.456(b)(1);[3] and the results of the lung diffusion capacity test administered by Dr. Jarboe, located in *DX* 14 and 17, are being excluded from the record pursuant to 20 C.F.R. § 718.107(b).[4] Moreover, Claimant's deposition testimony, which was submitted on February 9, 2004, may not be considered for the purpose of adjudicating the issue of liability. In this case, all evidence regarding the issue of liability had to be submitted to the district director by January 13, 2004. *DX* 22, 24 and 25.

## Overview of the Black Lung Benefits Program

The Black Lung Benefits Act is designed to compensate those miners who have acquired pneumoconiosis, commonly referred to as "black lung disease," while working in the Nation's coal mines. Those miners who have worked in or around mines and have inhaled coal mine dust over a period of time, may contract black lung disease. This disease may eventually render the miner totally disabled or contribute to his death.

## Procedural History

On May 9, 2003, Claimant filed a claim for benefits under the Act. *DX* 2 (Miner's Claim for Benefits Form CM-911). On March 18, 2004, the district director issued his Proposed Decision and Order denying Claimant benefits. *DX* 26. Shortly thereafter, on April 2, 2004, Claimant timely filed his Request for Hearing. *DX* 28. The case was then referred to the Office of Administrative Law Judges for a hearing on June 30, 2004, and thereafter assigned to this office. *See DX* 33.

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[2] Page numbers included in a citation, are the page numbers assigned to the exhibit by the Director and not the original page numbers of the document.

[3] In this case, the documents contained in Employer's attachments 1 and 2 were not submitted to the district director. Moreover Employer has not demonstrated that these attachments should be admitted into evidence in this matter due to extraordinary circumstances. Although attachment 2 is dated October, 15, 2004, Employer has not demonstrated that the exact same information for which the attachment was submitted was not obtainable by Employer at the time Employer had to submit such evidence to the district director. The record clearly shows that Employer in this case was given ample opportunity to submit such documents to the district director in accordance with the regulations. DX 19 and 22. Accordingly, extraordinary circumstances do not exist in this matter such that Employer's attachments may be admitted into the record. In this case, Employer also submitted the X-ray interpretation of Dr. Spitz. This interpretation is being excluded from the record because it exceeds the evidentiary limitation set forth in 20 C.F.R. §725.414(a)(3)(ii). Moreover, Employer did not list this interpretation on its evidence summary form. (*ALJX* 8) On the other hand, the Director did list Dr. Spitz's interpretation on his evidence summary form (*ALJX* 9), as his rebuttal evidence in this matter, but the Director may not submit evidence in this case because there is a designated responsible operator. See 20 C.F.R. §725.414(a)(3)(iii) and footnote in *Brasher v. Pleasant View Mining Co.*, 23 B.L.R. 1-141 (2006).

[4] Lung diffusion capacity tests are considered other medical evidence. Accordingly, the Presiding Judge may not consider such evidence unless Employer demonstrates that the test is medically acceptable and relevant to establishing or refuting Claimant's entitlement to benefits. 20 C.F.R. 718.107(b). In this case, the fact that Dr. Jarboe relied in part on the results of the lung diffusion capacity test in rendering his medical opinion provides some evidence that the test is relevant to the issue of whether Claimant is entitled to benefits. On the other hand, no evidence has been presented which would demonstrate that this test is medically acceptable. Accordingly, Employer has not met his burden in this instance and the test is therefore excluded.

By Notice of Hearing and Order issued October 7, 2005, a hearing was scheduled to be held on February 8, 2006, in Hazard, Kentucky. *ALJX* 1. By motion filed November 28, 2005, Claimant moved to waive the hearing and have the case decided on the record. *ALJX* 2. Neither Employer nor Carrier filed any objection to Claimant's Motion to Waive Hearing and Submit the Case on the Record, and by Order issued February 3, 2006, the Presiding Judge cancelled the hearing. *ALJX* 3.

By motion filed February 13, 2006, Employer moved to have the Presiding Judge set a briefing schedule so that the parties could file briefs regarding the responsible operator issue. *ALJX* 4. On May 30, 2006, the Presiding Judge issued an order setting the date by which briefs would be due: June 30, 2006. *ALJX* 5. On June 30, 2006, Claimant (*ALJX* 6) and Employer (*ALJX* 7) submitted their briefs by mail.

## Issues Presented for Adjudication

The issues listed as contested on the CM-1025 form include: (1) was the claim timely filed; (2) was Claimant a miner; (3) did Claimant work as a miner after December 31, 1969; (4) did Claimant work at least 30 years in or around one or more coal mines; (5) does Claimant have pneumoconiosis as defined by the Act and the regulations; (6) did Claimant's pneumoconiosis arise out of coal mine employment; (7) is Claimant totally disabled; (8) is Claimant's disability due to pneumoconiosis; (9) is the named employer the Responsible Operator;[5] (10) has the named employer secured the payment of benefits; (11) was Claimant's most recent period of cumulative employment of no less than one year with the named Responsible Operator.[6] *DX 33*.

## Findings of Fact and Conclusions of Law

### I. Background

#### A. Claimant's Personal, Employment, and Smoking History

Claimant was born on February 22, 1952. *DX* 16, 5:Q3-A3. He graduated from high school and has a medical card and mine foreman papers/certification. *DX* 16, 5:Q5-A6. Claimant is divorced and has no dependents. *DX* 2, 10 and 16, 6:Q8-A9. Claimant also has a history of smoking, although there is conflicting evidence in the record regarding this issue. Claimant stated in his deposition testimony that he "believes" he smoked for approximately 25

[5] On December 12, 2005, pursuant to the Notice of Hearing and Order (*ALJX* 1) issued by this court on October 7, 2005, Employer filed a Notice of Objection to the Designation of the Responsible Operator (Party) (*ALJX* 10).

[6] The CM-1025 form also states that the "designated Responsible Operator contests additional issues as listed in the letter dated ." DX 33. The date of the letter was omitted. Accordingly, the Presiding Judge has reviewed all letters submitted by Employer in this case to discern what other issues Employer may be contesting. After thoroughly reviewing the record, the Presiding Judge finds that the issues listed in Employer's letters are covered by the issues otherwise listed in the CM-1025 form. Additionally, the CM-1025 form states that the "employer can, without cause, contest those issues previously stipulated to at the informal conference, as stated in the Memorandum of Conference. The Memorandum of Conference has not been submitted to the court and is not part of the record. Furthermore, Employer has not brought to this court's attention any additional issues that are not otherwise covered by the issues specifically listed on the CM-1025 form. Accordingly, the court will only address the issues specifically set forth in the CM-1025 form.

years before he quit in or around September 2003. *DX* 16, 16:Q65-A66. Claimant further states that he "probably" smoked less than a pack a day. *DX* 16, 16:Q68-A68. Conversely, the physicians in this case who rendered medical opinions, Dr. Jarboe and Dr. Baker, both state that Claimant , in the past, smoked a pack a day and that Claimant smoked since either the age of 18 (Dr. Baker) or from the age of 22 or 23 (Dr. Jarboe). *DX* 12, 14, and 17. Based on this evidence, and Claimant's expressed uncertainty regarding his smoking history, the Presiding Judge finds that Claimant, in the past, smoked a pack of cigarettes per day and that he smoked for more than 25 years.

For approximately three decades, Claimant was employed in the mining industry. *DX* 16, 6:Q10-A10. Throughout this period, Claimant held several different positions, including industrial engineer, laborer foreman, assistant superintendent, mine foreman, and mine examiner. *DX* 3.

Claimant's last position of at least one year was with Coastal Coal Company as a mine foreman. *DX* 16, 11:Q38-A38; see herein, Section V. Issues 9-11: Responsible Operator. Claimant states that in this position, Claimant was essentially "a spare person" and that he performed essentially the same tasks that he performed in his other positions. In his deposition testimony, Claimant summarized the work he performed while working as a coal miner. *DX* 16.

While employed as an industrial engineer, Claimant took noise and dust samples and was required to "walk the belts each month" and go to the "face area" where coal was produced. *DX* 16, 6:Q11-7:A13. This position did not require Claimant to produce coal or do very much heavy lifting. *DX* 16, 7:Q14-A14, 8:Q19-A19. On the other hand, in order to take the dust and noise samples, Claimant had to go into the mines with the miners and check their pumps two hours after they began working and one hour before they quit working. *DX* 16, 7:Q16-A16. Usually when Claimant had to take these samples, he would remain with the miners throughout the day. *DX* 16, 7:Q16-A16.

As a laborer foreman, Claimant worked on a non-production shift as a "dead work foreman." *DX* 16, 9:Q23-A24. As part of his duties, Claimant was responsible for rock dusting and shoveling belts. *DX* 16, 9:Q23-A23. Additionally, Claimant stated that he actually worked at the face area for a few years when he drove a shuttle car and bridge carrier. *DX* 16, 9:A27-A28.

As an assistant superintendent, Claimant had to assign tasks to other workers, make sure that different sections were operating according to the mine plan, and perform tasks such as hauling supplies and needed parts into the mine and accompanying inspectors into the mine. *DX* 16, 10:Q33-A35. Claimant states that in this position, he was essentially considered an "extra person more than … an assistant superintendent or mine foreman." *DX* 16, 11:A34.

As a mine examiner, which was the last coal mine position that Claimant held before he quit working, Claimant would perform the weekly mine examinations, travel with the inspectors into the mine, carry supplies into the mine, pump water, and help maintain the mine. *DX* 16, 12:Q44-13:A47. Like Claimant's other positions, as a mine examiner, Claimant states that he was essentially considered a "spare person" or "utility man." *DX* 16, 13:A45.

On or around April 12, 2003, Claimant quit working as a coal mine employee. *DX* 16, 13:Q48-A48. Claimant states that he sustained an injury in 2002 to his back and neck, which eventually forced Claimant to quit working. *DX* 16, 13:Q48-A48. When asked in the deposition if, shortly before retiring, Claimant had difficulty performing any part of his job "from a breathing standpoint," Claimant stated that he had difficulty performing the weekly mine inspections, which required quite a bit of walking. DX 16, 17:Q73-A73. Claimant states that during the weekly mine exams, he would have to stop frequently and rest. *DX* 16, 17:Q73-A73. On the other hand, Claimant also states in his deposition that he never missed work or had to transfer or modify his job in any way due to a respiratory or breathing problem; was never treated for a respiratory or pulmonary condition; that the medications he was taking were for his back and neck condition; and that he had never been diagnosed with emphysema or chronic bronchitis. *DX* 16, 15:Q55-A55, 16:Q70-17:A71, and 17:Q74-A75. Moreover, Claimant stated that, prior to quitting in April 2003, Claimant had never been diagnosed with coal workers' pneumoconiosis or black lung. *DX* 16, 14:Q53-A53. Additionally, when Claimant was asked, if he did not have the problems with his back and neck would he be able to return to his usual coal mine employment, Claimant stated that he wasn't sure and he guessed that he could, "depending on the job." *DX* 16, 18:Q78-A78.

## II. Medical Evidence

The medical evidence in this case includes various pulmonary function studies, arterial blood-gas studies, chest x-rays, physicians' opinions, and a physician's deposition testimony, which are summarized below.

### A. Pulmonary Function Studies

In a claim for benefits under the Act, a Claimant must prove that he is totally disabled. One method by which total disability may be established is through a preponderance of qualifying pulmonary function studies. To be qualifying, the regulations provide that the FEV1 be qualifying *and* either (1) the MVV or FVC values must be equal to or fall below those values listed at Appendix B of 20 C.F.R. Part 718 for a miner of similar gender, age, and height, or (2) the result of the FEV1 divided by the FVC must be equal to or less that 55 percent. 20 C.F.R. § 718.204(b)(2)(i). The following pulmonary function studies are in the record:

| ***Exhibit #/ Submitting Party*** | ***Physician*** | ***Date of Test*** | ***age/height (in.) coop/comp*** | ***Tracings/ Flow-Vol. Loop*** | ***Bronchodilator?*** | ***FEV1*** | ***FVC/MVV*** | ***FEV1/FVC*** | ***Qualifies?*** |
|---|---|---|---|---|---|---|---|---|---|
| *DX* 12 / DOL Eval. | Dr. G. Baker | 7/9/03 | 51/ 68.5 Fair / Good | Yes | No | 3.58 | 4.74 / -- | 75.53% | No |
| *DX* 14 / E | Dr. T. Jarboe | 9/10/03 | 51 / 69.3 Yes / Good Effort | Yes | No | 3.66 | 4.43 / 89 | 82.62% | No |

B. Arterial Blood-Gas Studies

Another method by which total disability may be established is by qualifying blood-gas studies under 20 C.F.R. § 718.204(b)(2)(ii). To be qualifying, the PO2 values corresponding to the PCO2 values must be equal to or less than those found in the table in Appendix C of 20 C.F.R. Part 718. The following blood gas studies are in the record:

| *Exhibit # / Submitting Party* | *Physician* | *Date of Test* | *Altitude (feet)* | *Resting Exercise* | *PCO2* | *PO2* | *Qualifies?* |
|---|---|---|---|---|---|---|---|
| *DX* 12 / DOL Eval. | Dr. G. Baker | 7/9/03 | 0-2999 | Resting[7] | 40.0 | 91.0 | No |
| *DX* 14 / E | Dr. T. Jarboe | 9/10/03 | 0-2999 | Resting | 38.0 | 90.1 | No |

C. Chest X-rays[8]

The following chest X-ray reports are in the record:

| *Exhibit #/ Submitting Party/Purp.* | *Name of Reader* | *Radiological Qualification*[9] | *Date of Study* | *Date of Reading* | *Film Quality* | *Sm. Opacities Reading* | *Sm. Opacities Shape/Size Prim./Sec.* | *Sm. Opacities Zones* | *Large Opacities* |
|---|---|---|---|---|---|---|---|---|---|
| *CX*1 / C / Initial | Dr. M. Vuskovich | B | 5/1/03 | 7/6/03 | 1 | 1/1 | p/p | All | O |
| *DX* 12 / DOL Eval. | Dr. G. Baker | B | 7/9/03 | 7/9/03 | 1 | 1/0 | s/t | L (M/L), R (M/L) | O |
| *DX* 13 / DOL Eval. | Dr. P.J. Barrett | B, BCR | 7/9/03 | 7/25/03 | 1 | Quality | | | |
| *DX* 15 / E / Rebuttal | Dr. J. Wiot | B, BCR | 7/9/03 | 12/22/03 | 1 | Neg. | | | |

[7] The exercise portion of the study was medically contraindicated due to Claimant's degenerative joint disease.

[8] In this case, only Dr. Baker's X-ray report fully complies with the standards prescribed in 20 C.F.R. § 718.102. Dr. Wiot's report does not specify that he is a Board-certified radiologist, the name and qualifications of the X-ray technician, or that the film was interpreted in compliance with 20 C.F.R. § 718.102(c). Yet, in this case, the omitted information is ascertainable from other evidence in the record (X-ray technician name and qualifications – Dr. Baker's X-ray report; status as Board-certified radiologist – Dr. Wiot's curriculum vitae). Moreover, based on a review of the record, it is clear that the film was interpreted in substantial compliance with 20 C.F.R. § 718.102(c). Accordingly, Dr. Wiot's omissions are inconsequential under the circumstances. With regard to the X-ray reports of Drs. Vuskovich and Jarboe, both reports fail to specify either the name and qualifications of the X-ray technicians, or that the films were interpreted in compliance with 20 C.F.R. § 718.102(c). Dr. Jarboe also did not state on the form that he is a B-reader. Yet, in this case, the Presiding Judge does not find that these omissions, under the circumstances, affect either the technical validity or probative value of these X-ray reports. Moreover, according less weight to these opinions would not affect the decision in this matter. Here, both Employer and Claimant would be equally affected.

[9] A"B-reader" ("B") is a physician, but not necessarily a radiologist, who successfully completed an examination in interpreting x-ray studies conducted by, or on behalf of, the Appalachian Laboratory for Occupational Safety and Health (ALOSH). 20 C.F.R. § 718.202(a)(ii)(E). A designation of "Board-certified" ("BCR") denotes a physician who has been certified in radiology or diagnostic roentgenology by the American Board of Radiology or the American Osteopathic Association. 20 C.F.R. § 718.202(a)(ii)(C).

| | | | | | | |
|---|---|---|---|---|---|---|
| *DX* 14 & *DX* 17:6:1-2, 34 / E / Initial | Dr. T. Jarboe | B | 9/10/2003 | 9/11/2003 | 1 | Neg. |

D. Medical Opinions

In this case, the medical opinion evidence consists of the reports of Dr. Baker, who performed the U.S. Department of Labor sponsored pulmonary evaluation, and Dr. Jarboe.

*Medical Report by Dr. Baker*

Dr. Baker, who is a B-reader and a fellow of the American College of Chest Physicians, examined Claimant on July 9, 2003. *DX* 12. On a Medical History and Examination Form CM-988, Dr. Baker reported his medical findings. In that report, Dr. Baker refers to Claimant's CM 911a form, which notes approximately 32 years of coal mining employment. Dr. Baker notes that Claimant stated that 28-29 of those years involved working mostly underground. *DX* 12. Dr. Baker describes Claimant's last mining position of at least one year as "mine foreman." *DX* 12.

On the CM-988 form, Dr. Baker also set forth Claimant's family, medical, and social histories. *DX* 12. With regard to Claimant's medical history, in relevant part, Dr. Baker notes that Claimant has suffered from wheezing attacks for approximately 5 years and has had arthritis in his "back/neck/disc" for approximately 1-2 years. *DX* 12. In the social history section of his report, Dr. Baker states that, in the past, Claimant smoked approximately one pack of cigarettes per day since the age of 18 and that, at the time of the examination, Claimant was smoking one third of a pack of cigarettes per day. *DX* 12.

In his medical report, Dr. Baker also notes Claimant's present subjective complaints of sputum, wheezing, dyspnea, coughing, and chest pain. Additionally, Dr. Baker summarizes his physical findings based on a physical examination of Claimant. *DX* 12. Dr. Baker notes no abnormalities based on this physical examination. *DX* 12. In his medical report, Dr. Baker also includes a summary of the diagnostic tests performed on Claimant:

| | |
|---|---|
| Chest X-ray | Coal Workers' Pneumoconiosis 1/0, 1980 ILO. |
| Vent Study (PFS) | Within Normal Limits |
| Arterial Blood Gas | Within Normal Limits |
| Other: EKG | Normal Sinus Rhythm |

*DX* 12.

Under the Cardiopulmonary Diagnosis(es) section of the CM-988 form, Dr. Baker diagnosed Claimant as having: (1) coal workers' pneumoconiosis 1/0, which Dr. Baker diagnosed based on Claimant' abnormal chest X-ray and coal dust exposure and (2) bronchitis, which Dr. Baker diagnosed based on Claimant's history. *DX* 12. In the Etiology of Cardiopulmonary Diagnoses(es) section, Dr. Baker states that Claimant's coal workers' pneumoconiosis is attributable to coal dust exposure and that Claimant's bronchitis is attributable

to coal dust exposure and cigarette smoking. *DX* 12. In the Impairment section, Dr. Baker states that, with regard to both Claimant's coal workers' pneumoconiosis 1/0 and bronchitis, the degree of severity of the impairment, in terms of the extent to which the impairment affects Claimant's ability to perform his last coal mine job of one year's duration, is "minimal or none." *DX* 12. Finally, in his medical report, Dr. Baker notes that Claimant has degenerative joint disease and disc (cervical spine/lumbar to sacral spine) disease, although he does not note to what extent these conditions impair Claimant's ability to perform his coal mine work. *DX* 12.

*Medical Report by Dr. Jarboe*

Dr. Jarboe, who is a B-reader and Board-certified in internal medicine with a subspecialty in pulmonary disease, examined Claimant on September 10, 2003. *DX* 14 and 17:6:20-7:2. In his medical report, Dr. Jarboe summarized Claimant's work history. *DX* 14. Notably, Dr. Jarboe states that Claimant worked 30 years in and around coal dust and that Claimant estimates that 28 of those years were spent underground. *DX* 14. Dr. Jarboe also states that Claimant's last 20 years were in management and that Claimant mostly performed "dead work," which included laying track and rock dusting. *DX* 14. Additionally, Dr. Jarboe states that Claimant told him that he did not operate equipment to any great extent and that Claimant would wear a mask or respirator less than 5% of the time while working. *DX* 14. Lastly, Dr. Jarboe states that when Claimant worked on the surface, he worked on a railroad and cleaned coal cars. *DX* 14.

In his medical report, Dr. Jarboe also notes Claimant's present complaints: shortness of breath for over a year, wheezing which sometimes occurred when Claimant exercised vigorously, and coughing on a daily basis which sometimes produced mucus and had been present for the last few years. Moreover, Dr. Jarboe also notes that Claimant has a smoking history. *DX* 14. Dr. Jarboe states that Claimant began smoking habitually in his early twenties, around age 22 or 23, and that Claimant smoked approximately a pack per day. *DX* 14. At the time of Claimant's exam, Claimant was smoking approximately one third of a pack per day. *DX* 14.

Under the heading Review of Systems, Dr. Jarboe notes the current condition of Claimant's systems: "Perhaps a five pound weight gain since [Claimant] stopped working"; (1) ENT: some hearing loss; (2) respiratory: see Claimant's present complaints; (3) cardiovascular: occasional palpitation; (4) musculoskeletal: pain and discomfort in entire spine, and Claimant is said to have bulging and compressed discs in the spine; (5) neurological: some numbness and weakness in the right hand due to arthritis and disc disease in Claimant's neck. *DX* 14.

Under the heading Physical Examination, Dr. Jarboe notes, in relevant part, that with regard to examination of Claimant's chest, Claimant has "good air entry and distribution without rales or wheezes." *DX* 14. With regard to examination of Claimant's heart, Dr. Jarboe notes that Claimant has a regular rhythm without murmur or gallop. *DX* 14.

Dr. Jarboe, in his medical report, also summarizes the laboratory data he used to render his medical opinion. *DX* 14. Dr. Jarboe states that he reviewed a single PA radiograph of Claimant's chest, which was dated September 10, 2006. *DX* 14. Dr. Jarboe further states that

the X-ray was of acceptable quality, that the ILO classification was 0/0, and that there was no evidence of pneumoconiosis. *DX* 14. Dr Jarboe also performed pulmonary function and blood gas tests. *DX* 14. With regard to these tests, Dr. Jarboe states that the spirometry was completely normal and showed no evidence of restriction or obstruction; the lung volumes were normal; and that the resting arterial blood gases were entirely normal, although Claimant had elevated carboxy hemoglobin, which Dr. Jarboe states is compatible with continued exposure to tobacco smoke. *DX* 14.

The final section of Dr. Jarboe's medical report is comprised of his medical opinion and cardiopulmonary diagnoses. *DX* 14. In summary, Dr. Jarboe gave the following medical opinion:

> I am unable to make a diagnosis of any specific disease of the respiratory system in [Claimant]. He complains of some shortness of breath but pulmonary function studies and arterial blood gases are entirely normal. Must assume that the dyspnea is on a nonrespiratory basis.
>
> I do not feel there is sufficient medical evidence to make a diagnosis of coal workers' pneumoconiosis in [Claimant]. His chest x-ray is completely clear and his pulmonary functions are entirely normal. There is no evidence of restriction or obstruction as would be seen in a dust induced lung disease.
>
> [Claimant] has no respiratory impairment. Again this is based on completely normal spirometry, lung volumes, diffusion and arterial blood gases.
>
> Since [Claimant] has no respiratory impairment, there is no evidence of a totally and permanently disabling condition of the respiratory system. Specifically, there is no evidence of a totally and permanently disabling respiratory condition which has been caused by or substantially contributed to by the inhalation of coal dust or the presence of coal workers' pneumoconiosis. I feel [Claimant] fully retains the functional respiratory capacity to do his last coal mining job or one of similar physical demand in a dust free environment.

*DX* 14. Dr. Jarboe states that he renders all of his opinions and responses "within the realm of reasonable medical probability and/or certainty." *DX* 14.

E. Deposition of Dr. Jarboe

In a deposition taken on November 25, 2003, Dr. Jarboe summarized his medical education and credentials, which are also set forth in his curriculum vitae, which is also part of the record. *DX* 17, 3 and 6:10-7:5; *DX* 14. Notably, Dr. Jarboe graduated with a M.D. degree from Vanderbilt University; was a fellow, pulmonary diseases, University of Kentucky Medical Center between July 1969 and July 1970 and a fellow, cardiology, at that same university between July 1970 and December 1970; is Board-certified in internal medicine with a subspecialty in pulmonary disease; became a certified B-reader for pneumoconiosis on July 1, 1986; and is licensed to practice medicine in the state of Kentucky. *DX* 17, 6:10-7:5; *DX* 14.

Thereafter, Dr. Jarboe reviewed and summarized his medical evaluation of Claimant, which he performed on September 10, 2003. *DX* 17, 7:6-16:12. In regard to Dr. Jarboe's physical examination of Claimant, Dr. Jarboe states that he noted no abnormalities during the exam, which he would associate, in whole or in part, with the inhalation of coal mine, rock, or sand dust. *DX* 17, 9:22-2.

With regard to Dr. Jarboe's interpretation of Claimant's X-ray, which Dr. Jarboe says he compared to a standard set of ILO films, Dr. Jarboe classified the X-ray as 0/0, because he found no evidence of coal workers' pneumoconiosis. *DX* 17, 10:3-15. Dr. Jarboe states that, in order to make a diagnosis of Category 1/0, a physician "would have to see a few opacities, which usually are of the rounded type[,]" which are usually P or Q opacities, the most common type. *DX* 17, 10:16-11:3. Additionally, Dr. Jarboe states that based on the medical literature, coal workers' pneumoconiosis is a disease that is thought to initially affect the upper lung zones as opposed to the mid and lower lung zones. *DX* 17, 11:4-8. Moreover, Dr. Jarboe states that "[i]f someone categorized a film as 1/0 … that means that [the individual] thought that the amount of nodulation or the profusion of nodulation was such that [he] at last considered that the diagnosis was negative for pneumoconiosis." *DX* 17, 10:16-11:3. Furthermore, Dr. Jarboe states that the abnormalities caused by coal worker's pneumoconiosis that appear on an X-ray film are permanent in nature and therefore one would expect to see them consistently on X-rays taken in the same or within a short or reasonable time span. *DX* 17, 11:9-16.

Regarding the pulmonary and arterial blood-gas studies Dr. Jarboe administered, Dr. Jarboe states that these studies were performed in accordance with the guidelines promulgated by the United States Department of Labor. *DX* 17, 12:1-8. Dr. Jarboe further states that these studies were entirely normal. *DX* 17, 12:9-16, 15:15-21. As part of his "spirometric evaluation," Dr. Jarboe states that he administered lung volume and lung diffusion capacity tests.[10] *DX* 17, 12:17-19. Dr. Jarboe explains that there are a "couple of purposes for doing lung volumes." *DX* 17, 12:22-23. One reason for calculating lung volume is to "double check" the spirometric results. *DX* 17, 12:23-24. Dr. Jarboe further states that lung volumes are used to assist physicians in making diagnoses. *DX* 17, 12:23-13:17. In Claimant's case, Dr. Jarboe states that Claimant's total lung capacity was "entirely normal at 99 percent of predicted, which of course, corroborates or goes along with [Claimant's] totally normal FVC." *DX* 17, 13:18-23. Moreover, because Claimant shows no measurement or expression of disease of the lungs, Dr. Jarboe states that Claimant does not qualify for a diagnosis of legal pneumoconiosis. *DX* 17, 14:4-24. Furthermore, Dr. Jarboe states that this opinion would not change, even if Claimant's X-ray read positive for simple pneumoconiosis, because the disease would have had no effect on Claimant's respiratory functional capacity. *DX* 17, 14:5-15:14.

In regard to Claimant's employment history, Dr. Jarboe stated that working 30 years in and around coal mines, 28 of which Claimant states were spent underground, is a sufficient history for an individual to contract coal workers' pneumoconiosis. *DX* 17, 8:7-18. Moreover, Dr. Jarboe states that Claimant's smoking history, which Dr. Jarboe notes as being almost 30 years, is significant. *DX* 17, 9:7-17. Additionally, Dr. Jarboe states that he is familiar with the "physical and exertional requirements" of Claimant's primary work in the underground mines,

[10] As previously stated, the lung diffusion capacity test is being excluded in this case.

which involved performing mostly "dead work." *DX* 17, 8:19-9:1. Based on his examination and testing of Claimant, Dr. Jarboe opined that Claimant retains the respiratory and pulmonary capacity to perform his usual coal mine work, even when it is assumed that as part of that work, Claimant must do heavy manual labor. *DX* 17, 15:22-16:2. Additionally, Dr. Jarboe states that nothing in either his evaluation or testing contraindicate that Claimant has the respiratory and pulmonary capacity to perform regular repetitive lifting, bending, stooping, and crawling if these activities were required as part of Claimant's usual coal mine work. *DX* 17, 16:3-8.

## III. Issue 1: Timely filing of Claimant's claim

Pursuant to 20 C.F.R. §725.308, a "claim for benefits filed under this part by, or on behalf of, a miner shall be filed within three years after a medical determination of total disability due to pneumoconiosis which has been communicated to the miner or a person responsible for the care of the miner, or within three years after the date of enactment of the Black Lung Benefits Reform Act of 1977, whichever is later." 20 C.F.R. §725.308(a). Furthermore, although the time limits are mandatory and may not be waived or tolled except upon a showing of extraordinary circumstances, there "shall be a rebuttable presumption that every claim for benefits is timely filed." 20 C.F.R. §725.308(c).

In this case, the evidence supports a finding that Claimant timely filed his claim for benefits. First, Claimant states in his deposition testimony that he had never been diagnosed with coal workers' pneumoconiosis or black lung prior to ceasing his coal mine employment in April of 2003. *DX* 16, 14:Q53-A53. Additionally, Claimant's response to Question 9 on the Miner's Claim for Benefits CM-911 form also supports that Claimant did not learn that he may have pneumoconiosis until shortly before he filed his claim. *DX* 2. Although Claimant's response is not actually responsive to the question being asked, which states "[d]escribe briefly any disability you believe you have due to pneumoconiosis (Black Lung) or other respiratory or pulmonary disease resulting from coal mine employment," Claimant responded by stating that "[his] doctor [took] an x-ray last week." *DX* 2. It appears that Claimant read the question as asking, *on what basis* does Claimant believe he suffers from a disability resulting from coal mine employment. This evidence supports a finding that Claimant first learned that he might be suffering from pneumoconiosis the week before he filed his claim for benefits. Moreover, Employer has introduced no evidence into the record to rebut the presumption that Claimant's claim was timely filed; i.e. the record is completely devoid of any evidence which would demonstrate that Claimant has ever been informed that he is totally disabled due to pneumoconiosis. Accordingly, the Presiding Judge finds that Claimant filed his claim for benefits within the statutory period.

## IV. Issues 2-4: Coal Miner and Length of Coal Mine Employment

In this case, Employer has agreed to stipulate that Claimant has 28 years of coal mine employment. *ALJX* 7 at 3. Employer has also stated in its brief that "here there is no question but that the [C]laimant was employed by [Employer] from 1998 until January of 2003. *ALJX* 7 at 12. Accordingly, issues 2 through 4 may be considered settled in this matter. The Presiding Judge has reviewed Claimant's (1) deposition testimony; (2) response to Question 8 on the

Miner's Claim for Benefits CM-911 form; (3) employment history listed on CM-911a form; and (4) work history, as described in the FICA earnings statement for years 1978-2003, the itemized statement of earnings for years 1968-2002, Claimant's 2002 W-2 form, and Claimant's earnings statement for period ending April 15, 2003. Based on a thorough review of these documents, the Presiding Judge finds that the evidence supports a finding of *at least* 28 years of coal mine employment.[11] Moreover, Employer's offered stipulation is, overall, quite consistent with Claimant's claim of 30 years and the director's finding of 28 years of coal mine employment. *DX* 2 and 26. Accordingly, for the foregoing reasons and because the Presiding Judge finds that any discrepancy in the exact number of years of coal mine employment in this case will have no impact on the decision rendered herein, the Presiding Judge accepts Employer's offered stipulation and finds that Claimant has 28 years of coal mine employment.[12]

V. Issues 9-11: Responsible Operator

Section 725.495(a)(1) states that the "operator responsible for the payment of benefits in a claim adjudicated under this part (the 'responsible operator') shall be the potentially liable operator, as determined in accordance with § 725.494, that most recently employed the miner." 20 C.F.R. § 725.495(a)(1). The burden to prove that the responsible operator initially found liable for the payment of benefits is a potentially liable operator is born by the Director. 20 C.F.R. § 725.495(b). In the absence of evidence to the contrary, the regulations state that it shall be presumed that the designated responsible operator is capable of assuming liability for the payment of benefits. 20 C.F.R. § 725.495(b).

The regulations define an operator as any owner, lessee, or other person who operates, controls, or supervises a mine; any independent contractor performing services or construction at a mine; any person who employs an individual in the transportation of coal or in coal mine construction at a mining site, to the extent such individual is exposed to coal mine dust as a result of such employment; any successor operator; or anyone who pays or provides benefits to an individual in exchange for working as a miner. 20 C.F.R. § 725.491.

Under Section 725.492, the regulations define a successor operator to include: any person who acquired a mine or mining business, or substantially all of the assets thereof from a prior operator on or after January 1, 1970; or any entity that results from a reorganization, liquidation, sale of substantially all of the prior operator's assets, merger, consolidation, division, or any other transaction that is substantially similar to those previously listed. 20 C.F.R. § 725.492(a)-(c). The employment relationship which is created in the case of a successor operator is defined in Section 725.493(b)(1), which states, "[i]n any case in which an operator may be considered a successor operator … any employment with a prior operator shall also be deemed to be employment by the successor operator." 20 C.F.R. § 725.493(b)(1). If the miner was not independently employed by the successor operator, "the prior operator shall remain primarily liable for the payment of any benefits" to which the miner is entitled. 20 C.F.R.

[11] The evidence supports a finding of between 28 and 29 years of coal mine employment.

[12] In this case, the physicians who evaluated Claimant used slightly longer periods of coal mine employment than 28 years. Nevertheless, the periods actually used by the physicians are sufficiently close to 28 years so that any discrepancy in this case would be inconsequential and *would not*, therefore, support a finding that the medical opinions rendered in this case are unreliable. Moreover, 28 years of coal mine employment is more than the minimum number of years required for Claimant to qualify for any presumptions that are applicable in this case.

§ 725.493(b)(1). On the other hand, if the "miner was independently employed by the successor operator after the transaction giving rise to successor operator liability, the successor operator shall be primarily liable for the payment of any benefits." 20 C.F.R. § 725.493(b)(1).

Under Section 725.494, an operator may be considered a potentially liable operator if several conditions are met: (a) the miner's disability or death arose at least in part out of employment in or around a mine or other facility during a period when the mine or facility was operated by such operator or by a person with respect to which the operator may be considered a successor operator; (b) the operator, or any person with respect to which the operator may be considered a successor operator, was an operator of the mine after June 30, 1973; (c) the miner was employed by the operator, or any person with respect to which the operator may be considered a successor operator, for a cumulative period of at least one year; (d) the miner was employed by the operator, or any person with respect to which the operator may be considered a successor operator, for at least one working day after December 31, 1969; and (e) the operator is capable of assuming liability for the payment of benefits. 20 C.F.R. § 725.494. For the purpose of determining whether an operator is a potentially liable operator, there is a rebuttable presumption that the miner's disability or death arose, in whole or in part, out of the miner's employment with the operator. 20 C.F.R. § 725.494(a).

Once an operator is designated as the responsible operator, that operator shall bear the burden of proving either:

> (1) That it does not possess sufficient assets to secure the payment of benefits … ; or
>
> (2) That it is not the potentially liable operator that most recently employed the miner.
>
> Such proof must include evidence that the miner was employed as a miner after he or she stopped working for the designated responsible operator and that the person by whom he or she was employed is a potentially liable operator within the meaning of Sec. 725.494. In order to establish that a more recent employer is a potentially liable operator, the designated responsible operator must demonstrate that the more recent employer possesses sufficient assets to secure the payment of benefits in accordance with Sec. 725.606.

20 C.F.R. § 725.495(c). Moreover, the regulations provide that, once a case has been transferred to the Office of Administrative Law Judges for hearing, "documentary evidence pertaining to the liability of a potentially liable operator and/or the identification of a responsible operator which was not submitted to the district director shall not be admitted into the hearing record in the absence of extraordinary circumstances." 20 C.F.R. § 725.456(b)(1).

In this case, Employer has conceded that Claimant was employed by Employer from 1998 until January of 2003. *ALJX* 7 at 12. Moreover, this concession is supported by ample evidence in the record and the record contains no evidence to rebut the presumption that, if Claimant is determined to have pneumoconiosis, that Claimant's disability arose at least in part

out of his employment with Employer. *DX* 3, 7, 8, 16, and 18. Accordingly, the Presiding Judge finds that the Director met his initial burden of proving that Employer is a potentially liable operator in this case.

The burden, therefore, is on Employer to demonstrate that either (1) it does not possess sufficient assets to secure the payment of Claimant's benefits, should Claimant prevail in this case, or (2) that it is not the potentially liable operator that most recently employed Claimant. Employer has presented no evidence regarding either of these elements.[13] Accordingly, the Presiding Judge finds that Employer has not met its burden of proof and is the properly designated responsible operator in this case.

## VI. Issues 5-8: The Standard for Entitlement

In this case, Claimant filed his claim after April 1, 1980. Therefore, this claim is governed by the regulations at 20 C.F.R. Part 718. Under Part 718, Claimant bears the burden of establishing each of the following elements by a preponderance of the evidence: (1) Claimant has pneumoconiosis; (2) the pneumoconiosis arose out of coal mine employment; (3) Claimant is totally disabled; and (4) the pneumoconiosis contributes to Claimant's total disability. 20 C.F.R. §725.202(d)(2). Failure to establish any one of these elements precludes entitlement to benefits.

### A. Elements 1-2: Existence of Pneumoconiosis and its Etiology

Pneumoconiosis is defined as a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." 20 C.F.R. § 718.201(a). Pneumoconiosis is recognized as "a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. § 718.201(c). Under the amended regulations, the definition of pneumoconiosis includes both clinical and legal pneumoconiosis:

> (1) Clinical Pneumoconiosis. "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconiosis, i.e., the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.
>
> (2) Legal Pneumoconiosis. "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.

[13] Although Employer alleges that Enterprise Mining Company, LLC, for whom Claimant worked for approximately three months in 2003, is a successor operator as defined in the regulations, and therefore primarily liable for the payment of benefits in this case (*ALJX* 7, at 1-3 and 12-14), there is no evidence in the record to support this allegation.

20 C.F.R. § 718.201(a)(1)-(2). For the purpose of defining pneumoconiosis, "a disease 'arising out of coal mine employment' includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. § 718.201(b). Moreover, the amended regulations provide that, if a miner suffers from pneumoconiosis and has engaged in coal mine employment for ten years or more, as in this case, there is a rebuttable presumption that the pneumoconiosis arose out of such employment. 20 C.F.R. § 718.203(b).

The existence of pneumoconiosis may be established by any one or more of the following methods: (1) chest X-rays; (2) autopsy or biopsy; (3) by operation of presumption; or (4) by a physician exercising sound medical judgment based on objective medical evidence. 20 C.F.R. § 718.202(a).[14]

*Chest X-rays*

When weighing chest x-ray evidence, the provisions at 20 C.F.R. § 718.202(a)(1) require that "where two or more X-ray reports are in conflict, in evaluating such X-ray reports consideration shall be given to the radiological qualifications of the physicians interpreting such X-rays." In this vein, the Board has held that it is proper to accord greater weight to the interpretation of a B-reader or Board-certified radiologist over that of a physician without these specialized qualifications. *Roberts v. Bethlehem Mines Corp.*, 8 B.L.R. 1-211 (1985); *Allen v. Riley Hall Coal Co.*, 6 B.L.R. 1-376 (1983). Moreover, an interpretation by a dually-qualified B-reader and Board-certified radiologist may be accorded greater weight than that of a B-reader. *Roberts v. Bethlehem Mines Corp.*, 8 B.L.R. 1-211 (1985); *Sheckler v. Clinchfield Coal Co.*, 7 B.L.R. 1-128 (1984).

Based on the chest X-ray evidence summarized above, Claimant has not established that he suffers from pneumoconiosis. Although there are two positive X-ray readings for pneumoconiosis in the record, Dr. Vuskovich's 1/1 reading and Dr. Baker's 1/0 reading, there are also two negative X-ray readings in the record: readings by Dr. Wiot, and Dr. Jarboe. *CX* 1, *DX* 12 and 14. In this case however, although all of the physicians who read Claimant's X-rays are B-readers, only Dr. Wiot is also a Board-certified radiologist and therefore dually qualified. *DX* 15. Furthermore, Dr. Wiot appears to have substantially more experience in the field of radiology than any of the other physicians in this case.[15] *CX* 1, *DX* 12 and 14. For these reasons, the Presiding Judge accords greater weight to the opinion of Dr. Wiot. Consequently, in reconciling Dr. Wiot's and Dr. Baker's conflicting interpretations of the X-ray dated July 9, 2003, the Presiding Judge finds that the preponderance of the evidence is that this particular X-ray is negative for pneumoconiosis.[16] Moreover, when Dr. Wiot's interpretation is considered in

[14] There is no autopsy or biopsy evidence in this record and the presumptions contained at §§ 718.304 - 718.306 are inapplicable in this case. Accordingly, these methods of demonstrating pneumoconiosis will not be discussed further in this Decision.

[15] Dr. Baker's curriculum vitae is not in the record.

[16] This finding is further supported by Dr. Jarboe's deposition testimony. In this case, Dr. Baker, who read Claimant's X-ray as positive for pneumoconiosis, noted in his X-ray report that he found opacities in Claimant's mid and lower lung zones and that these opacities were abnormally shaped (s and t type). Yet, according to Dr. Jarboe, in the case of coal workers' pneumoconiosis, opacities are usually of the rounded type (usually p or q) and

conjunction with Dr. Jarboe's interpretation and weighed against the interpretation of Dr. Vuskovich, the Presiding Judge finds that the preponderance of all X-ray evidence presented in this case is negative for pneumoconiosis. Accordingly, Claimant has failed to establish the presence of pneumoconiosis under 20 C.F.R. § 718.202(a)(1).

*Medical Opinions*

The final method by which Claimant may establish that he suffers from pneumoconiosis is by well-reasoned, well-documented medical reports rendered by physicians exercising sound medical judgment based on objective medical evidence, such as blood-gas studies, electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories. *See* 20 C.F.R. 718.202(a)(4). A "documented" opinion is one that sets forth the clinical findings, observations, facts and other data on which the physician based the diagnosis. *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19 (1987). An opinion may be adequately documented if it is based on items such as a physical examination, symptoms, and the patient's history. *See Hoffman v. B&G Construction Co.*, 8 B.L.R. 1-65 (1985); *Hess v. Clinchfield Coal Co.*, 7 B.L.R. 1-295 (1984).

A "reasoned" opinion is one in which the administrative law judge finds the underlying documentation adequate to support the physician's conclusions. *Fields, supra*. Indeed, whether a medical report is sufficiently documented and reasoned is for the administrative law judge as the finder-of-fact to decide. *See Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989)(en banc). Moreover, legal pneumoconiosis is established by well-reasoned medical reports, which support a finding that the miner's pulmonary or respiratory condition is significantly related to or substantially aggravated by coal dust exposure. *Wilburn v. Director, OWCP*, 11 B.L.R. 1-135 (1988).

As summarized above, the medical opinion evidence in this case consists of the reports of Dr. Baker and Dr. Jarboe. *DX* 12 and 14. As fact-finder, the Presiding Judge has thoroughly reviewed the conflicting medical opinion evidence in the record. Based on this review, the Presiding Judge finds Dr. Jarboe's medical opinion to be the better reasoned of the two opinions because it is more consistent with the credible objective clinical test results rendered in this case (i.e. negative X-ray interpretations, pulmonary function studies, blood gas studies, and physical examinations). Moreover, the Presiding Judge accords more weight to the opinion of Dr. Jarboe, because he has credentials that are superior to Dr. Baker's. Although Dr. Baker is a B-reader and a fellow of the American College of Chest Physicians, there is no evidence in the record that Dr. Baker holds credentials comparable to those of Dr. Jarboe. Specifically, there is no evidence that Dr. Baker is Board-certified in internal medicine or that he holds a subspecialty in pulmonary disease.

In this case, although the Presiding Judge finds that Dr. Baker's medical opinion that Claimant has coal workers' pneumoconiosis 1/0 is well-documented, the Presiding Judge does not find Dr. Baker's medical opinion to be well-reasoned. First, with regard to this diagnosis,

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are thought to initially affect the upper lung zones, opposed to the mid and lower lung zones. *DX* 17, 10:16-23 and 11:4-8. Accordingly, Dr. Jarboe's testimony provides further evidence that Dr. Wiot's, rather than Dr. Baker's, interpretation of the X-ray dated July 9, 2003 is correct.

Dr. Baker specifically states that it is based on his reading of Claimant's X-ray and Claimant's history of coal dust exposure. In this case, Dr. Baker's diagnosis is nothing more than a restatement of the X-ray reading and is not a reasoned medical judgment within the meaning of § 718.202(a)(4). *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576 (6th Cir. 2000) *and Worhach v. Director, OWCP*, 17 B.L.R. 1-105, 1-110 (1993) (internal citations omitted). Moreover, as previously discussed, Dr. Baker's positive interpretation of Claimant's X-ray is inconsistent with the preponderance of the X-ray evidence presented in this case, which is negative for pneumoconiosis. Here, both an equally qualified physician (Dr. Jarboe) and a better qualified physician (Dr. Wiot) found that Claimant does not have clinical pneumoconiosis. Accordingly, because Dr. Baker's diagnosis of coal workers' pneumoconiosis is based solely on Claimant's history of coal dust exposure and his own interpretation of Claimant's X-ray, the Presiding Judge finds that Dr. Baker's diagnosis is not well-reasoned.

Additionally, the Presiding Judge also finds Dr. Baker's medical opinion that Claimant suffers from bronchitis caused by Claimant's cigarette smoking and exposure to coal dust to not be well-documented or well-reasoned.[17] Although Dr. Baker set forth his clinical findings, observations, facts, and other data in his medical report, Dr. Baker provided only a very general explanation for why he diagnosed Claimant with bronchitis. Dr. Baker states that he based his opinion on Claimant's history, but he does not elaborate on what aspects of Claimant's history led him to diagnose Claimant with bronchitis. This explanation is not sufficient for the Presiding Judge to find Dr. Baker's opinion to be well-documented or well-reasoned. After reviewing Dr. Baker's report, it appears that the only evidence presented in Dr. Baker's report, which reflects that Claimant may have respiratory or pulmonary problems, is Claimant's own recounting of his current medical complaints.[18] Notably, the information provided by Dr. Baker regarding his physical examination of Claimant (which notes no abnormalities) and the clinical tests performed on Claimant (which provide no evidence that Claimant suffers from any chronic lung disease or impairment or any chronic restrictive or obstructive pulmonary disease) provide no evidence that Claimant has a respiratory or pulmonary problem and do not support Dr. Baker's diagnosis of bronchitis. Unfortunately, based on what is written in Dr. Baker's report, it is unclear whether Dr. Baker merely overlooked this other objective evidence or if Dr. Baker had a reason for making his diagnosis, notwithstanding the contrary evidence presented by his own physical examination of Claimant and the clinical tests he performed as part of his evaluation. Consequently, when Dr. Baker's medical report is considered as a whole, the Presiding Judges finds that Dr. Baker's diagnosis of bronchitis is not based on objective medical evidence, as required by 20 C.F.R. § 718.202(a)(4) and is not well-documented or well-reasoned.

Conversely, the Presiding Judge finds Dr. Jarboe's medical opinion to be both well-documented and well-reasoned.[19] Overall, Dr. Jarboe's opinion that Claimant does not have coal

[17] The Presiding Judge notes that Dr. Baker did not diagnose Claimant with chronic bronchitis.

[18] Notably, § 718.202(c) of Title 20 of the Code of Federal Regulations provides that a determination of the existence of pneumoconiosis shall not be made solely on the basis of a living miner's statements or testimony. 20 C.F.R. § 718.202(c).

[19] In this case, the clinical tests (pulmonary function study and arterial blood-gas study) administered by Dr. Jarboe do not fully comply with the standards prescribed in Subpart B of 20 C.F.R. Part 718. Nevertheless, in this instance, the Presiding Judge does not find that the specific information omitted by Dr. Jarboe in his report affects the technical validity or probative value of the clinical test results. Although Dr. Jarboe did not specify all information required under Subpart B of 20 C.F.R. Part 718 in his report, Dr. Jarboe did state in his deposition that he is familiar

workers' pneumoconiosis (clinical or legal) is consistent with what Dr. Jarboe observed during his physical examination of Claimant and the credible, objective results of the clinical tests performed in this case, including the negative X-ray evidence for pneumoconiosis, nonqualifying pulmonary function studies, and nonqualifying arterial blood gas tests. Although Dr. Jarboe's opinion was, in part, based on excluded evidence (the lung diffusion capacity test), the Presiding Judge still finds Dr. Jarboe's opinion to be well-reasoned. In this case, it is clear from Dr. Jarboe's medical report and deposition testimony that he relied on other objective medical evidence when forming his opinion. Moreover, the Presiding Judge finds that the other medical evidence relied upon by Dr. Jarboe in this case is more than sufficient on its own to support Dr. Jarboe's medical opinion regarding Claimant. Accordingly, the Presiding Judge finds that Dr. Jarboe's consideration of the nonconforming evidence was inconsequential and that his medical opinion is well-reasoned.

Overall, after reviewing the opinions of Dr. Baker and Dr. Jarboe, the Presiding Judge finds that Claimant has failed to establish by a preponderance of the medical opinion evidence that he has pneumoconiosis under 20 C.F.R. § 718.202(a)(4). In this case, the Presiding Judge found Dr. Baker's opinion that Claimant has coal workers' pneumoconiosis to be not well-reasoned and his opinion that Claimant has bronchitis to be both not well-documented and not well-reasoned. Moreover, Dr. Jarboe opined that Claimant does not suffer from coal workers' pneumoconiosis. Accordingly, there is no credible medical opinion evidence in this case to support a finding in Claimant's favor.

*Conclusion*

Based on a thorough review of all evidence presented in this case, the Presiding Judge finds that the preponderance of the evidence demonstrates that Claimant does not have either clinical or legal pneumoconiosis as defined in the amended regulations. Consequently, Claimant cannot establish that the disease arose from his coal mine employment.[20] Moreover, even if Claimant could in fact prove that he is totally disabled, he would not be able to prove the fourth element, which requires that Claimant's total disability be caused, at least in part, by pneumoconiosis.[21] As a result, Claimant is not eligible for benefits under the Act.

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with the Department of Labor's guidelines for administering pulmonary function and arterial blood-gas tests and that these tests were administered in accordance therewith. Therefore, under these circumstances, the Presiding Judge finds that the pulmonary function and arterial blood-gas tests administered by Dr. Jarboe are in substantial compliance with the standards prescribed in Subpart B of 20 C.F.R. Part 718. *Yet, notwithstanding this finding, the Presiding Judge notes that, even if he found these tests to be nonconforming and therefore either found Dr. Jarboe's medical report to not be credible or accorded it less weight, the decision in this case would not be affected.* Here, Dr. Baker's opinion that Claimant has coal workers' pneumoconiosis has been found to be not well-reasoned and his diagnosis that Claimant has bronchitis has been found to be both not well-documented and not well-reasoned. Accordingly, there is no credible medical opinion evidence in the record to support a finding that Claimant has pneumoconiosis. If the Presiding Judge also found Dr. Jarboe's opinion to not be credible, there would simply be no credible medical opinion evidence in this case and Claimant would still not prevail. In a claim for benefits, Claimant bears the burden of proving that he has pneumoconiosis. Therefore, under the circumstances, Dr. Jarboe's medical opinion is not dispositive.

[20] If claimant had successfully established the existence of pneumoconiosis, then pursuant to 20 C.F.R. § 718.203(b), Claimant would have been entitled to the rebuttable presumption that the disease arose from his more than ten years of coal mine employment.

[21] In this case, assuming *arguendo* that Claimant had in fact proven that he has pneumoconiosis arising from his coal mine employment, Claimant would still not be eligible for benefits under the Act because the overwhelming

## ORDER

For the reasons stated in the foregoing Decision, IT IS ORDERED that Claimant W.I.'s claim for benefits is **DENIED**.

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Daniel A. Sarno, Jr.
Administrative Law Judge

DAS/mam

## NOTICE OF APPEAL RIGHTS

If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the administrative law judge's decision is filed with the district director's office. See 20 C.F.R. §§ 725.478 and 725.479. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. See 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Allen Feldman, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. See 20 C.F.R. § 725.481.

If an appeal is not timely filed with the Board, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).

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preponderance of the evidence demonstrates that Claimant is not totally disabled. In this case, although Claimant stated in his deposition testimony that, shortly before he quit working, he had difficulty performing the weekly mine exams because he was having difficulty breathing when he walked and had to stop frequently and rest (DX 16, 17:Q730A73), all of the objective medical evidence and physicians opinions demonstrate that Claimant is not totally disabled. In this case, two pulmonary function studies and two blood gas studies were introduced into the record. None of these studies rendered values that would qualify under Appendices B or C of 20 C.F.R. Part 718. Moreover, Dr. Jarboe, in his medical report and deposition testimony, opined that Claimant has the respiratory and pulmonary capacity to perform his usual coal mine employment. *DX* 14, and 17, 15:22-16:8. Dr. Baker opined in his medical report that Claimant's impairment due to either pneumoconiosis or bronchitis (assuming *arguendo* that those diagnoses were found to be well-reasoned) would cause minimal to no impairment in Claimant's ability to perform his job. *DX* 12, Furthermore, there is no evidence in the record of cor pulmonale with right-sided congestive heart failure.